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No. 07-173

In the Supreme Court of the United States

AHMED BELBACHA, PETITIONER

v.

GEORGE W. BUSH,
PRESIDENT OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether, notwithstanding the express terms of the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, the district court had jurisdiction to enter an injunction barring petitioner—an alien detained as an enemy combatant at Guantanamo Bay—from being released from United States custody and returned to his home country.

PARTIES TO THE PROCEEDINGS

Petitioner is Ahmed Belbacha.

Respondents are George W. Bush, President of the United States; Robert M. Gates, Secretary of Defense; Jay Hood, Commander, Joint Task Force, GTMO; and Mike Bumgarner.

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OPINIONS BELOW

The order of the district court (Pet. App. a1-a4) is unreported.

JURISDICTION

The petition for a writ of certiorari before judgment was filed on August 9, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2101(e).

STATEMENT

1. Petitioner is an Algerian citizen who is detained as an enemy combatant at the Guantanamo Bay Naval Station. Petitioner has been given a formal adjudicatory hearing before a Combatant Status Review Tribunal (CSRT), and the CSRT determined that he is an enemy combatant. 07-5258 Gov't C.A. Opp. to Pet. Emer. Mot.

to Stay Transfer 2 (Under Seal) (07-5258 Gov't C.A. Opp.).

2. In December 2005, petitioner filed a petition for a writ of habeas corpus. In *Boumediene* v. *Bush*, 476 F.3d 981, 988 (D.C. Cir.), cert. granted, 127 S. Ct. 3078 (2007) the court of appeals held that Section 7 of the Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2635, divests the district courts of jurisdiction over habeas petitions filed by Guantanamo Bay detainees. In response to the decision in *Boumediene*, the government moved to dismiss the habeas petition in this case. 07-5258 Gov't C.A. Opp. 2. That motion is still pending in the district court. *Id.* at 2 n.1.

3. Although petitioner is an enemy combatant, the Department of Defense has determined that he is eligible for transfer out of Guantanamo Bay, subject to the process for making appropriate diplomatic arrangements for another country to receive him. 07-5258 Gov't C.A. Opp. 2-3. Petitioner has sought to block any potential transfer to his home country of Algeria, and he filed a motion in district court requesting a temporary restraining order barring such a transfer. Due to diplomatic interests and security concerns, respondents advised the district court that they could not comment on any potential repatriation of petitioner to Algeria. See Declaration of Clint Williamson, Ambassador-at-Large for War Crimes Issues ¶¶ 9-10 (Williamson Decl.); Declaration of Joseph Benkert, Principal Deputy Assistant Secretary of Defense for Global Security Affairs ¶ 8 (Benkert Decl.) (07-5258 Gov't C.A. Opp. Exhs. 6, 7 (Under Seal)).[1]

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[1] Due to the same concerns, respondents still cannot officially comment on whether or when petitioner might be transferred from Guantanamo Bay to Algeria.

4. The district court denied petitioner's motion, concluding that it lacked jurisdiction to prevent his potential transfer from Guantanamo Bay to Algeria. Pet. App. a1-a4. "[O]n that question," the district court held, "the MCA is clear: the Court lacks jurisdiction over any and all non-habeas claims raised by aliens who are detained as enemy combatants." *Id.* at a3. The court noted that the District of Columbia Circuit had already denied "a similar motion to enjoin the transfer of a Guantanamo detainee based on lack of jurisdiction," *ibid.* (citing *Zalita* v. *Bush*, No. 07-5129 (D.C. Cir. Apr. 25, 2007), stay denied, 127 S. Ct. 2159 (2007)), and a "motion for an order requiring the United States to provide 30 day[s'] notice before transferring the detainee from Guantanamo," *ibid.* (citing *Hamlily* v. *Gates*, No. 07-1127 (D.C. Cir. Jul. 16, 2007)).

5. Petitioner appealed the district court's ruling and asked the court of appeals for an injunction pending appeal. The court of appeals denied the motion for an injunction on the ground that it lacked jurisdiction, and it ordered that petitioner's appeal of the district court's order be heard on an expedited basis. Pet. App. a5-a6. The court of appeals has since entered a scheduling order under which briefing will be completed by November 5, 2007.

On August 3, 2007, petitioner filed an emergency application in this Court for an injunction barring his transfer from Guantanamo Bay. *Belbacha* v. *Bush*, No. 07A98. On August 10, 2007, the Court denied the application.

ARGUMENT

Petitioner makes the extraordinary request (Pet. 5-26) that this Court grant a writ of certiorari before judg-

ment to review the district court's denial of an injunction barring his transfer out of Guantanamo Bay. This Court recently denied his application for just such an injunction, and there is no basis for this Court to take the extraordinary step of granting a writ of certiorari before judgment to review the denial of his request for the same relief. See Sup. Ct. R. 11 (a petition for a writ of certiorari before judgment "will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court").

1. Petitioner asserts (Pet. 5-6) that this Court should take the extraordinary step of granting a writ of certiorari before judgment because he "may be sent to Algeria as early as this week, consigning him to likely torture and other abuse and extinguishing this Court's ability to decide those issues in time to provide relief." But in denying petitioner's request for an emergency injunction, the Court necessarily determined—correctly—that those allegations do not require immediate relief, or any expedition of the appellate process beyond what the court of appeals has already provided. Petitioner fails to explain how a request for relief that the Court has already denied could possibly be a matter of imperative public importance justifying the extraordinary procedure of granting a writ of certiorari before judgment. For the same reasons that this Court denied petitioner's request for an emergency injunction, therefore, it should deny his petition for a writ of certiorari before judgment.

2. Petitioner also contends (Pet. 5) that a writ of certiorari before judgment is proper here because the courts below denied his request for an emergency injunction on the ground that they lacked jurisdiction to grant such relief. Although petitioner does not elaborate on this argument, he appears to be suggesting that a writ of certiorari before judgment is proper whenever full consideration of an appeal by a court of appeals is likely to be futile. That is not the law. Courts frequently deny motions for a stay or injunction pending appeal on the ground that the moving party has no likelihood of success on the merits. Allowing a writ of certiorari before judgment whenever full review by a court of appeals seems futile would turn what this Court has emphasized is an extraordinary procedure into a routine one.

Petitioner's theory also fails because he clearly is not entitled to the relief he requests on appeal: an order barring his potential transfer. Congress has explicitly withdrawn jurisdiction from the courts to block the transfer of detainees from Guantanamo Bay. The MCA provides that "[n]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination." MCA § 7(a), 120 Stat. 2636. It further states that "no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, *trans-*

fer, treatment, trial, or conditions of confinement" of such an alien. *Ibid.* (emphasis added).[2]

This petition for a writ of certiorari before judgment stems from an appeal of the district court's denial of petitioner's motion to enjoin his potential transfer from Guantanamo Bay to Algeria, and the court of appeals's order stating that it lacked jurisdiction to grant injunctive relief pending that appeal. In seeking injunctive relief, petitioner directly challenges an "aspect of the * * * transfer * * * of an alien who is * * * detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant." MCA § 7(a), 120 Stat. 2636. Thus, the district and circuit courts properly held that they lacked jurisdiction to grant the relief sought.[3]

In any event, petitioner's claim would also fail on the merits because the relief he seeks would conflict with separation of powers principles. The Executive's efforts

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[2] A detainee may file a petition for review in the District of Columbia Circuit under the Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001-1006, 119 Stat. 2739-2744, challenging the determination of a CSRT that he is an enemy combatant. See MCA § 7(a), 120 Stat. 2635. Petitioner has not filed such a challenge. In any event, neither the DTA nor traditional habeas would support this extraordinary effort to enjoin a *release* from custody.

[3] Petitioner refers in passing (Pet. 1) to the All Writs Act, 28 U.S.C. 1651(a), but Section 7(a) of the MCA, 120 Stat. 2636, expressly withdraws *all* jurisdiction relating to the transfer of a detainee from Guantanamo Bay. In any event, the All Writs Act simply confers authority to issue "process 'in aid of' the issuing court's jurisdiction"; it is not an independent jurisdictional grant. *Clinton* v. *Goldsmith*, 526 U.S. 529, 534 (1999) (quoting 28 U.S.C. 1651(a)). Accordingly, the All Writs Act does not authorize injunctive relief concerning transfers. See *Zalita* v. *Bush*, No. 07-5129 (D.C. Cir. Apr. 25, 2007), stay denied, 127 S. Ct. 2159 (2007).

to arrange for transfers of wartime detainees and to ensure that another country provides adequate assurances regarding their treatment of transferees is a quintessential function of foreign affairs within the sole province of the Executive. The process is "delicate, complex, and involve[s] large elements of prophecy. [It] should be undertaken only by those directly responsible to the people." *Chicago & S. Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948); cf. *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 381 (2000).

The order petitioner seeks would directly intrude upon foreign affairs and the government's ability to resettle wartime detainees. Repatriations and transfers of wartime detainees are typically the result of sensitive negotiations between Executive Branch officials and senior officials of foreign governments. See Williamson Decl. ¶¶ 5-6, 9-10; Benkert Decl. ¶¶ 5, 8.[4] Entertaining petitioner's claim would require the Court to insert itself into sensitive diplomatic matters. It would involve scrutiny of United States officials' assessments of the likeli-

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[4] As explained in more detail in the opposition to petitioner's motion for an emergency injunction, it is the policy of the United States not to repatriate or transfer a detainee to a country where the United States believes it is more likely than not that the individual will be tortured. Williamson Decl. ¶ 4; Benkert Decl. ¶¶ 6-7. If a transfer is deemed otherwise appropriate, assurances regarding the detainee's treatment are sought from the country to which the transfer of the detainee is proposed. Williamson Decl. ¶ 5-6; Benkert Decl. ¶ 6. If the assurances obtained from the receiving government are not sufficient when balanced against treatment concerns, the United States would not transfer a detainee to the control of that government. Williamson Decl. ¶ 8; Benkert Decl. ¶ 7. Indeed, the Department of Defense has decided in the past not to transfer detainees to their country of origin because of mistreatment concerns. *Ibid.*

hood of torture in a foreign country, including judgments regarding the state of diplomatic relations with a foreign government, the reliability of representations from a foreign government, and the adequacy of assurances provided and a foreign government's capability to fulfill them. Williamson Decl. ¶¶ 6-8; Benkert Decl. ¶¶ 5-8.

In addition, requiring the United States "to disclose outside appropriate Executive branch channels its communications with a foreign government" would make that government "reluctant in the future to communicate frankly with the United States concerning such issues." Williamson Decl. ¶ 10. And "review in a public forum of the Department's dealings with a particular foreign government regarding transfer matters would seriously undermine our ability to investigate allegations of mistreatment or torture that come to our attention and to reach acceptable accommodations with other governments to address those important concerns." *Ibid.*; see, *e.g.*, *Chicago & S. Air Lines, Inc.*, 333 U.S. at 111 ("It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. * * * [E]ven if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial."). Thus, even if the district court had jurisdiction, petitioner would not be entitled to the injunction he seeks.

3. Petitioner contends (Pet. 7) that a writ of certiorari before judgment is appropriate here because this case "runs parallel" to *Boudemiene* v. *Bush*, cert. granted, 127 S. Ct. 3078 (2007) (No. 06-1195). That is incorrect. The questions presented in *Boumediene* are whether Section 7(a) of the MCA removes federal court

jurisdiction over habeas petitions filed by aliens detained as enemy combatants at Guantanamo Bay; whether those aliens have rights under the Suspension Clause; and if so, whether the MCA violates the Suspension Clause. By contrast, petitioner's request for an injunction barring his transfer from Guantanamo is not based on a habeas petition governed by the first part of Section 7(a) of the MCA; rather, it is a challenge to an "aspect of the * * * *transfer* * * * of an alien" governed by the second part of Section 7(a) (emphasis added). The *Boumediene* case does not involve a challenge to the second part of Section 7(a) of the MCA or the issue of whether courts may lawfully block a potential transfer. Even if the MCA's removal of federal court jurisdiction over habeas petitions seeking release were held to be unconstitutional, that holding would not affect the independent provision of the MCA that expressly removes jurisdiction over any claims regarding transfer. See MCA § 7(a), 120 Stat. 2635.

Moreover, the fact that petitioner seeks to block a potential transfer *out of* United States custody clearly distinguishes his claims from those raised in *Boumediene* and from traditional habeas claims more generally. Unlike the petitioners in *Boumediene*, petitioner is in no sense seeking habeas relief, and his request for injunctive relief therefore raises no issues under the Suspension Clause. Habeas has traditionally afforded a mechanism for challenging one's detention, not for challenging one's transfer or release *out of* custody. See, *e.g.*, *Wilkinson* v. *Dotson*, 544 U.S. 74, 79 (2005) (explaining that the "core" relief afforded by the writ of habeas corpus is "immediate release or a shorter period of detention"); *Preiser* v. *Rodriguez*, 411 U.S. 475, 499-500 (1973); *Cochran* v. *Buss*, 381 F.3d 637, 639 (7th Cir. 2004).

Furthermore, even if this case did present the same issues as *Boumediene*, it would not be necessary to hold the petition. The court of appeals—which has expedited consideration of petitioner's appeal—has not yet issued a judgment. Once this Court decides *Boumediene*, the court of appeals will be able to apply this Court's rulings in deciding petitioner's case without the need for action by this Court.

4. Petitioner's remaining arguments are unavailing. Petitioner relies (Pet. 6-7) on *Ex parte Quirin*, 317 U.S. 1 (1942), where this Court granted a writ of certiorari before judgment to review whether German saboteurs could be subjected to trial by military commission, with the possibility of execution if they were convicted, and *Barefoot* v. *Estelle*, 463 U.S. 880 (1983), where this Court granted a writ of certiorari before judgment to review the denial of a stay of execution. Those cases are inapposite. The petitioner here does not face any execution; to the contrary, he seeks an order precluding the government from *releasing* him from United States custody and returning him to his home country.

Petitioner also contends (Pet. 7-22) that a writ of certiorari before judgment is appropriate to resolve an alleged conflict among the circuits regarding the proper standards for granting a temporary restraining order. Although courts have used different verbal formulations to describe the standard, petitioner does not show that any differences in terminology or description lead to different outcomes in actual cases, much less to a different outcome in this case. For example, it is doubtful that a "substantial" likelihood of success on the merits is any different in practice from a "strong" likelihood or a "reasonable probability" of success. Pet. 14-16 (citations omitted). And, in any event, in light of the unam-

biguous language of the MCA barring judicial review over actions such as this seeking to block a transfer out of Guantanamo Bay, petitioner cannot show *any* likelihood of success.

Finally, petitioner argues (Pet. 22) that this Court should grant a writ of certiorari before judgment to consider "the standard by which lower courts should act to preserve their ultimate jurisdiction during a period that existence of jurisdiction is unresolved." That issue is not presented here, because there is nothing "unresolved" about the district court's lack of jurisdiction. Rather, Congress has unambiguously barred any court from considering an application for a writ of habeas corpus filed by an alien who, like petitioner, has been determined to be an enemy combatant, and it has further prohibited any court from considering any action relating to the "transfer" of an alien who has been determined to be an enemy combatant. MCA § 7(a), 120 Stat. 2636. None of the cases petitioner cites (Pet. 23-25) involved a situation in which Congress has specifically withdrawn jurisdiction from a court to hear a particular type of case or issue a specific form of relief.

CONCLUSION

The petition for a writ of certiorari before judgment should be denied.

Respectfully submitted.

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